

1980

Jack H. Ryan and Emma Jean Ryan, Husband and Wife v. J. Elliot Earl : Respondents Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JACK H. RYAN and EMMA JEAN
RYAN, husband and wife,

Plaintiffs-Respondents,

vs.

J. ELLIOT EARL,

Defendant-Appellant.

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CASE NO. 16843

RESPONDENTS BRIEF

Appeal from the Judgment of the
First District Court

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AUTHORITIES CITED

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|---------------------------|----|
| 17 AmJur 2d 113 | .7 |
| 17 AmJur 2d 335 | .7 |
| 17 AmJur 2d 617 | .7 |

STATUTES CITED

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| 25 - 5 - 8 U.C.A. 1953. | .20 |
|---------------------------------|-----|

IN THE SUPREME COURT OF THE STATE OF UTAH

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CASE NO. 16843

RESPONDENT'S BRIEF

STATEMENT OF FACTS

The Respondent asserts the statement of fact as set forth by the Appellant in his Brief are disputed and the following are the uncontroverted facts upon which the Court based its findings, which facts are as follows:

1. That the Appellant, J. Elliot Earl was a joint tenant with Anthony V. Haynie, Jr. to the property described in the said Complaint by virtue of a Warranty Deed issued to them on March 12, 1963.

2. That the Respondents purchased the undivided 1/2 interest of Anthony V. Haynie, Jr. in the said property for the sum of \$27,500.00 after he learned that Mr. Haynie was co-tenant on the property with Mr. Earl. Checks for payment of the purchase price were issued and delivered to Mr.

| | | |
|--------------------|---------|-------------|
| Haynie as follows: | 9-23-77 | \$ 5,000.00 |
| | 1-2-78 | \$22,500.00 |

3. Deeds conveying Anthony B. Haynie's 1/2 interest in the property to Respondents were prepared and recorded in the office of the County Recorder, Cache County, Utah, on March 9, 1979, and on September 17, 1979, respectfully.

4. That Plaintiff, Jack Ryan issued checks and or paid accounts of Appellant totaling the sum of \$28,500.00 for his 1/2 interest in the property first check # 9169 dated September 30, 1977 paid and delivered to Elliott Earl in the amount of \$5,000.00 on which check was typed the following:

| | |
|-----------------|-----------------|
| \$28,500.00 | |
| 12,761.90 | loan |
| <u>5,000.00</u> | check |
| \$10,738.10 | balance on land |

That on or about the 15th day of November 1977, the Respondent paid off Appellant's Earl's loan with First Federal Savings, which loan was secured on the property involved in this suit in the amount of \$12,514.33, Defendant Earl had been paying on this loan at the rate of \$157.00 per month at 10 percent interest.

5. That thereafter on December 10, 1977, the Respondents issued and delivered a check to Jay Elliott Earl, upon which was written, "balance on land, paid in full", (Plaintiff Exhibit 4) plus delivered to him a statement for repairs on his forklift and payment for back water taxes on the farm.

6. That through an inadvertent mistake, the Respondents deducted the foregoing payments from the sum of \$27,500.00 (See Exhibit 7) when in truth and fact it should have been \$28,500.00, was the agreed sale price. Thereafter when this error was discovered by Respondents, they obtained a cashiers check for \$1,000.00 payable to Jay Elliott Earl from First Security Bank, dated March 26, 1979 was delivered to the Respondent, together with an additional cashier's check for the difference in the payoff of the First Federal Savings and Loan in the amount of \$247.64. These two checks were delivered to Plaintiff at the time demand was made upon himn for execution of the Deed for his 1/2 interest in the property to the Respondents. The Appellant refused to execute the deed.

7. Respondents on or about December 1, 1977 entered into possession of the property, removed the Appellants personal property from the building located upon the property and took exclusive possession thereof and immediately commenced to construct a new home on the said property.

8. That between December 1, 1977 and April 1, 1979, the Respondents constructed a new home on the said property, during which time the Appellant delivered to the home, the brick to be used in the construction of the home. Numerous

other visits were made by Appellant to property during the time improvements were made thereon by Respondent, and he took no action whatever.

9. That at the time of entering into the possession of the above described property, the farm was in generally run-down condition, the building was in poor condition and repair, having broken cinder block, the doors were bent, the oil furnace was not operating, castelite remenants stuck to the cement floor and the roof was leaking.

10. That the Respondents, upon entering possession of the property, made many valuable improvements on the property, consisting of the following to the building: Put in new bathroom and shower in the shop, built an office, built a saddle room, fixed the roof, rewired the building, put new light fixtures in the building, installed rain gutters, installed the yard light, built butcher shop with 13X15 freezer, leveled around the shop, built a large sump and filled in the various holes.

11. The Respondents made the following improvements to the farm: Hired a surveyor to fix the fence line on the South, built new fence and gates, hired a backhoe to dig an irrigation ditch from 10th West along the South line of the property, had LeGrand Johnson haul 60 truckloads of dirt

from the spring area, made a new irrigation ditch to carry the waters to the West side of the property so the same could be properly irrigated, drained the property, dug a new water well for culinary use which was piped into the new home and the shop, plowed and leveled the North half of the property and planted alfalfa, hauled numerous loads of gravel on the road.

12. That the Respondents paid the 1978 taxes on the said property and that thereafter the Appellant paid the same taxes on the said property.

13. The following facts were controverted: The Respondents claim that the Appellant entered into an oral agreement on or about September 30, 1977 to sell his 1/2 interest in the property for the sum of \$28,500.00 and told them to go ahead and pay off the loan at the First Federal Savings and Loan as part of the consideration. The balance of the purchase after payment of the loan would be payable to the Respondents, and that when the said payment was made, the Appellant refused to sign the deed claiming that he had never agreed to sell the property to the Respondents, but on the alternative, wanted to have the property appraised and partitioned.

ARGUMENT AND LAW

POINT I

AN ORAL OR IMPLIED CONTRACT IS ENFORCEABLE

Contracts are said to be either expressed or implied. Contracts are expressed when their terms are stated by the parties. There are times when contracts may be implied, when the terms are not so stated. Thus, implied contracts is one inferred from the conduct of the parties though not expressed in words. Implied contract in fact are inferred from the facts and circumstances of the case and are not formally or explicitly stated in words. The only difference between an expressed contract and an implied contract is that in the former, the parties have arrived at their agreement by words, whether oral or written, while in the latter, their agreement is arrived at by consideration of their acts and conduct, and that in both of these cases there is in fact a contract existing between the parties. The only difference being the character of the evidence necessary to establish it. In other words, in an expressed contract all of the terms and conditions are expressed between the parties while an implied contract, some one or more of the terms and conditions may be implied from the conduct of the parties. An implied contract between two parties arises when the facts are such that an intent may be

inferred on their part to make a contract. All pertinent circumstances must taken into consideration. (17 AM Jur 2d, Contracts, Section 3, pg. 335)

In 77 Am Jur 2d, pg. 617, it states that "The Purchaser in a contract for sale and purchase of land has several legal and equitable remedies against the vendor when the latter wrongfully fails or refuses to perform his part of the contract to convey to the purchaser the kind of title which he is contracted to convey. If the vendor is able but unwilling or refuses to convey title to the land as contracted to do, the vendee may proceed in equity for specific performance". Respondents are seeking specific performance.

77 Am Jr 2d, Section 113 states that in order for that person to be entitled to specific performance, must show that the contract is fair and equitable and free from any fraud or misrepresentation or overreaching on his part. That the Respondents have done.

POINT II

THE EVIDENCE CLEARLY SUPPORTS THE FINDINGS OF THE LOWER COURT.

IF THERE IS COMPETENT EVIDENCE TO SUPPORT THE JUDGMENT

THE SUPREME COURT ON REVIEW MUST VIEW THE SAME IN THE

LIGHT MOST FAVORABLE TO SUSTAIN THE JUDGMENT

Upon review by the Supreme Court, the Utah Supreme Court has stated the rule as follows:

"On Conflicting matters, evidence on appeal is to be viewed in the light most favorable to the part for whom the Judgment was entered and when so viewed, if there is sufficient competent evidence to support the judgment, it will not be disturbed". (See Christensen vs. Christensen, 339 Pacific 2d 101, 103, Staley vs. Grants, 2 Utah 2d 421, 276 P2d 489. and Erickson vs. Bennison, Utah 503 P2d 141.

In Ervell vs. Salt Lake City Corp. 493 P2d, 1283, 1285, Judge Crocket made the following statement which seems to apply to the Appellant herein when he said:

"In preface to discussion of the various contentions of the appellant Railroads it should be said that they have indulged in the euphoric fallacy so common to losing litigants: a blithe persistence in assuming that the facts are as they desire to see them, rather than as they were seen by the jury. It therefore seems necessary to reiterate the basic rule of review: that we are obliged to survey the evidence, and all reasonable inferences that could fairly be drawn therefrom in the light favorable to the verdict and Judgment".

The Respondent, Ryan, recognizes that an oral agreement must be established by clear, unequivocal and definite evidence, (See Ravill vs. Price, 123 Utah 559, 26 P2d 579. This burden the Plaintiff assumed and proved in this case. The evidence provided in this case is summarized as follows:

1. That prior to July 12, 1977 Jack Ryan, the Plaintiff entered into negotiations with the Defendant, Elliott Earl to purchase the property which is the subject matter of the litigation (TR pp 107-21) and at that time, the Plaintiff thought that the Defendant, Earl, was the sole owner of the said property, (TR pp 108-23). That on or about July 12, 1977, the Plaintiff offered to purchase from Earl, the above described property for the sum of \$55,000.00 and issued a check of down payment in the amount of \$5,000.00, which check was held by the Defendant and never accepted or cashed and was later returned to Plaintiff. (TR p 108)

2. That in subsequent negotiations, the Plaintiff learned that the Defendant, Earl did not own the fee title of the said property but in fact owned a 1/2 interest in the property and the other 1/2 interest was owned by Anthony B. Haynie, Jr. (TR p 109). That at the suggestion of the Defendant, Earl, Mr. Ryan, on or about the 23rd day of September, 1977, negotiated a purchase of Anthony Haynie's 1/2 interest in the property for the sum of \$27,500.00 (TR pp 109-110) and (TR p 125), and received a deed from Mr. Haynie (Exhibits 18 & 19). The Plaintiff informed Mr. Earl that he

had purchased Mr. Haynie's 1/2 interest for \$27,500.00. (TR p 128-5). The Plaintiff, Mr. Ryan then made a new offer on or about September 30, 1977 to Mr. Earl of \$28,500.00 for his 1/2 interest in the property, the same being \$1,000.00 more than paid to Mr. Haynie. (TR pp 128 and 171-18). Mr. Earl said he'd go along with this, and told Ryan to pay off his loan at First Federal Savings (TR p 128). Mr. Ryan gave Mr. Earl a check for down payment of \$5,000.00. (TR pp 128-22). (See also Plaintiff Exhibit No. 3) on which check was written the following:

| | |
|-----------------|-----------------|
| \$28,500.00 | |
| 12,761.90 | Loan |
| <u>5,000.00</u> | |
| \$10,738.00 | Balance on Land |

Plaintiff, Mr. Ryan then proceeded to pay off Earl's loan at First Federal Savings, by making a loan of \$70,000.00 at First Federal, (Plaintiff Exhibit No. 26) and from this loan the Plaintiff paid off Earl's loan of \$12,514.33 on or about November 15, 1977. (Plaintiff Exhibit No. 25)

3. On December 10, 1977, Plaintiff delivered a check for \$9,587.01 (Plaintiff Exhibit 4) plus a paid bill for \$151.09 (Plaintiff Exhibit No. 7) for payment of back water taxes and some work done on Defendant's forklift. This check was

given to Defendants partner, Mr. Hill at Defendant's new place of business. Two days later Defendant, however, told Ryan he had received checks (TR pp 131-25) and looked over the figures and everything seemed alright (TR 131-25)

4. That on or about December 1, 1977, the Plaintiff Ryan, entered into exclusive possession of the above described property (TR pp 66-6, 238-10) and commenced to make valuable improvement on the property to the land and the cinder block building expending \$15,000.00 to \$20,000.00, (TR 157-158) which improvements consisted of the following: Replacing the damaged block in front of the door on the cinder block building, repairing the roof on the cinder block building, rewiring the cinder block building, installing new light fixtures, rain gutters and yard lights on the cinder block building, installing new motor in the furnace in the cinder block building, straightening the overhead doors, installing the new woodburning stove, installing the new bathroom and shower in the shop in the cinder block building, constructing a new butcher shop which is attached to the cinder block building, building of a freezer in the building, leveling of the yard around the shop, filling the holes and building a large sump for drain

water, hiring of a surveyer to fix the property with the neighbor, building a fence and gates on the property lines, hiring a backhoe to dig an irrigation ditch to get the waters from 10th West to the West side of the property, construction of a drain pond with ditches for draining of the land, digging of a new culinary water well and running water lines into the new house and the construction of a new home on the property (TR 157). Mr. Ryan also commenced building a new home on the property and expended \$80,000.00 before he ran out of money to finish the house. (TR 159).

5. Mr. Ryan mistakenly assumed when he paid off the loan at First Federal Savings & Loan that the bank would follow through and get the deed from Earl for him (TR 130-2, See also TR 119-3).

6. Plaintiff paid the property taxes on the property in the Fall of 1978, (Exhibit 9) Defendant a month later paid the taxes on the same property.

7. In early 1979, when Mr. Ryan learned he didn't have the title (TR 144-5) he contacted his attorney and realized that he owed \$1,247.64 additional amount. Plaintiff then purchased cashier checks and delivered them to Defendant (Plaintiff Exhibit No. 8), and demanded a deed which the

Defendant refused and claimed there was no agreement to sell his property.

After reviewing Appellant's Brief, it appears that there is no dispute as to the law that is applicable in this case. The differences are one of fact. The Defendant claims that there is no conduct of the parties that could be constructed as acceptance thereby creating a contract. This is not true. Let us summarize the evidence what this conduct was.

1. At TR 128-6 I asked the question of Mr. Ryan about the formation of the contract on September 30, 1977:

- Q. What did Elliott (Defendant) say?
- A. Well, he says--I don't know just what he said then, but then I told him that I'd like to buy his piece now, so I could have it all in one piece and that I'd give him another thousand dollars for it and he says, "Well, that sounds pretty good." He says that he'd go with that and we would have an agreement on that but that it would be my ground at twenty-eight and that the extra thousand dollars made the difference.
- Q. \$28,500.00; is that correct?
- A. Yes, \$28,500.00 and at that time is when he told me to go up and pay the loan off and get it all straightened around.
- Q. Did you issue a check to Mr. Earl at that time?
- A. I gave him a check for \$5,000.00 and he told me at that time, he say, "I can't cash this now on account of my divorce trouble and the things that I have there so I'll just have to keep it until I find out whether I have to buy a new home or any of these other things. So he says, "I'll just put it

- in the drawer here until such time I can do this."
- Q. Did you ever tell him in any way that he couldn't cash that check?
- A. No. I told him that the check was as good as gold. He could cash it anytime he wanted. It would be the sooner the better for me.
- Q. You gave him the check on September 30, Mr. Ryan, and did you make an effort then to pay off the loan at First Federal Savings?
- A. Yes, I made arrangements to get the money and that there--to pay the loan off. That's when I went up and borrowed the \$70,000.00.

2. In mid December 1977 Defendant told Plaintiff he'd received the check of \$9,587.01 and everything seemed alright and he put it in the drawer because he still didn't know how he was going to come out on his divorce deal. At (TR 131-25) to TR 132-4) Ryan again testified:

- A. Yes, at that time he told me he received the check and looked over the figures and everything and everything seems to be alright, and he put it in the drawer with the other one because he still didn't know just how he was going to come out on his divorce deal and that.

3. The Plaintiffs went into exclusive possession of the property and moved Defendant's stuff from the building without his permission. Defendant Earl testified as follows: (TR 238-7)

- Q. With regard to the situation there, isn't it true that Jack took exclusive possession of the building after he went into possession?
- A. Without permission, yes.
- Q. And he moved all of your stuff out?
- A. Without permission, yes.

4. After Mr. Ryan had taken possession he started making many improvements. At TR 153-17 I asked Mr. Ryan the following:

- Q. In connection with all of these improvements was Mr. Earl down there when you were making these improvements and saw these?
- A. Yes. Like I said, a number of times, one time he come down there for a water tank and a pump and another time he came down to get something out of the station wagon.
- Q. At any of those occasions did he offer to give you your check back and say that he hadn't sold the property to you?
- A. He never mentioned anything about any deal at all. Other than things like it looks like you're really changing the face of this place.
- Q. Did he ever exert any right to possession or assume any rights to possession?
- A. No, he never did. When he wanted to use any of it, it was when he came down with that camper and wanted permission to keep it up there.

5. The Plaintiffs immediately started building a new home on the property and spent up to \$80,000.00 when their money ran out. (TR 159-3) During the construction on the home the Defendant, Mr. Earl, delivered brick for the home. At TR 242-5 Mr. Earl testified as follows:

- Q. But during the course of construction you delivered the brick?
- A. Yes.
- Q. Certainly you knew there was a nice home because it was up to square?
- A. Sure.
- Q. Did you do anything to protect your interest in that half of the property under that home?

- A. I thought that until I had made some kind of a commitment that I was in the driver's seat and it would be up to Jack to come around and take care of those obligations.

6. In the Fall of 1978 almost one year after Plaintiffs took possession the Defendant called Mr. Ryan and asked for permission to put his camper on the property for the winter. Mr. Ryan testified as follows at (TR 155-8):

- A. Well, he phoned up and my wife answered the phone. She called me down there and he asked permission to put his camper out there because he didn't have no place to put it.

7. Defendant never offered to pay for any of the improvements (TR 163-7). Mr. Ryan's testimony:

- Q. Did he ever offer to pay you anything for any of the improvements either to the land or building?
A. No.

8. During cross examination the Defendant stated to Mr. Ryan that he would sell for a fair price, (TR 243-7) Mr. Earl's testimony:

- Q. Isn't it true, in fact, that you told him you would sell that property at a fair price?
A. Yes, I did.
See also (TR 51-8)

The testimony of Plaintiff's two appraisers, Nixon and Balls, and the appraiser of Defendant, Tom Singleton, show that the price offered of \$28,500.00 was more than appraised value. See testimony of Jack Nixon and Lynn Balls and Tom Singleton. (TR 12 Nixon - TR 192 to 196-21 Balls) (TR 203 to 211-15 Singleton).

9. After Plaintiff paid off Earl's loan at First Federal Savings and Loan, Defendant was relieved of making the monthly loan payment of approximately \$157.00 per month and went from November 1977 to the date of trial two years and never paid any monthly payment or interest to Mr. Ryan (TR 64-1).

10. Defendant claims he was after Plaintiff to get an agreement all through these many months. Yet Defendant was in contact with his attorney, Mr. Lanny Gunnell, and never made any effort to get him to make the agreement or do anything to assert any rights to the property. See TR 245-3 to TR 245-15)

11. Defendant received the checks and kept them until the suit was commenced, when he refused to sign a deed. I asked Mr. Ryan the following at (TR 246-13):

Q. But you seemed intent on keeping the checks, didn't you, which you did. You kept the checks?

A. Yes, I kept the checks.

Then at TR 162-5 I asked Mr. Ryan:

Q. Between the time you gave the checks to Mr. Earl and the time you went to get the deed signed, did he ever offer to return the checks to you or give them back to you?

A. No.

Then I asked the following question at TR 162-21:

Q. Did you ever, when you saw him from time to time after you gave the checks to him, did you ask him why he hadn't cashed the checks?

A. Yes, a number of times.

Q. What did he say?

- A. Well, to start with, it was the divorce and then he was going to buy some land and then later on he was going to buy a diesel truck and then he was on that land again.
- Q. At any of those occasions that you talked to him about it, did he ever say he was not going to cash those checks?
- A. No, he never did tell me he wasn't going to cash them.
- Q. Did he ever offer to pay you anything for any of the improvements either to the land or building?
- A. No.

The foregoing evidence clearly supports the court's Finding No. 4 of the Findings of Fact and Conclusions of Law.

The trial Court from the evidence made its Finding No. 5 which reads as follows: (File 73-74)

"The Court finds that an oral contract was entered into between the parties was clear, definite and mutually understood and established by clear unequivocal and different testimony or other evidence presented in the above matter. The Court further finds that some of the testimony was disputed, but that such disputed testimony does not bar the finding that the contract was established by the evidence. The Court finds the only dispute in the evidence was that of a conversation of September 30, 1977. Plaintiff testified that a contract was formed, that the reason the Defendant did not deposit the check for \$5,000.00 down payment, was because of the uncertainty of a pending divorce proceeding. The Defendant testified and claims that he was holding the check as "a good faith offer". The Court determines that the testimony of the Plaintiff

was more convincing to the Court. That subsequent actions of the Defendant support the Plaintiff's version of the oral contract. The Court finds that the Defendant never again asserted any claims of ownership in the property from the time he surrendered possession thereof to the Plaintiffs, until he duplicated the payment of the property taxes on the property on November 30, 1978, which taxes the Defendant paid after the Plaintiff had paid the taxes on the said property. That Defendant did not store his pickup or boat on the property after he delivered possession to the Plaintiffs, even though he needed storage for these items, and the Defendant made no objection to the outside storage of his property that was stored in the building prior to the contract. That Defendant asked for permission from the Plaintiff, Jack Ryan, to store his camper on the property in the fall of 1978, and allowed the Plaintiff to designate the place for its storage. That Defendant did not object to the payment of the mortgage by the Plaintiff, and was relieved of making the monthly payments thereon. That Defendant received and kept the second check in the sum of \$9,587.01 plus a bill marked paid without objection until after this suit was filed. That Defendant unloaded brick for the Plaintiff at the time he was constructing a new house on the said property in Spring of 1978, at which time the house was up to a square without any objections being made by the Defendant. That Defendant allowed the Plaintiff to make valuable improvements on the property as set forth in paragraph 4 above, and the Court further finds that in all matters, the Defendant acted as if the property was owned by the Plaintiff exclusively until after the full purchase price was tendered to him in March of 1979, when he refused to execute a deed to the Plaintiff. This action was then commenced on April 12, 1979.

POINT III

PART PERFORMANCE OF AN ORAL CONTRACT REMOVES A CONTRACT FOR SALE OF LAND FROM THE STATUTE OF FRAUDS

It is clear that the law states that part performance on the part of a vendee removes a contract from the sale of land from the Statute of Frauds.

Section 25-5-8 U.C.A. 1953 provides,

"Nothing in this chapter contained shall be construed to abridge the power of the Courts to compel the specific performance of agreements in case of part performance thereof".

Where there is no memorandum reduced to writing and no writing subscribed by the parties to be charged, but the owner had accepted the consideration and surrendered possession, there was sufficient part performance to avoid the Statute of Frauds. (See Henry Madson's Estate, 259 2d 595).

The Utah Supreme Court in the case of Ravarino vs. Price, 260 2d, 579, states the general rule on part performance as follows:

"It is to be noted that possession by the Plaintiff is regarded as an important fact, one of which is generally directly referable to a contract, and when combined with permanent valuable improvements which are representative of the existence of the oral contract,

virtually every jurisdiction grants specific performance. The same limitation, of course, is placed on the Plaintiffs' possession as found when improvements are relied upon, it must be of such a nature that it would not have been given without the presence of the oral contract to convey."

In the *Wooley vs. Brown*, 529 P 2d, 1035, appears to be the last decision in this general area, the Utah Supreme Court stated it could not permit a party to accept performance for many years and then claim terms contrary to the evidence as basis to substantiate an assertion of indefiniteness and thus avoid specific performance. The conduct of the parties is totally consistent with the existence of an oral contract as claimed by the Plaintiff. When Mr. Ryan was asked as to whether or not he would have made these costly improvements on the property if, in fact, there had not been a contract, he answered as follows: (TR 250-4)

Q. Jack, if you had had any knowledge or indication from Mr. Earl that he would not sell his one-half interest, would you have gone ahead and built your home on that property?

A. "No way".

After the following objection the witness then answered: "No, I wouldn't have built anything nor done anything. I would have grabbed my checks or whatever and ran and wouldn't get involved in no deals". (See TR 250-13)

The Utah Supreme Court discusses at length the part

performance Ravarino vs. Price Utah 260 P 2d, 570 where at page 578 it states:

"In order that a Plaintiff may be permitted give evidence of a contract not in writing, and which is in the very teeth of the statute and nullity at law, is essential that he establish (in equity) by clear and positive proof, acts and things done in pursuance and on account thereof, exclusively referable thereto, which will take it out of the operation of the statute."

The Utah Court, at page 579 states:

"It is to be noted that possession by the Plaintiff is regarded as an important fact, one which is generally directly referable to a contract, and when combined with permanent and valuable improvements which are representative of the existence of an oral contract, virtually every jurisdiction will grant specific performance. The same limitation, of course, is placed on the Plaintiff's possession as is found when improvements are relied upon: it must be of such a nature that it would not have been given without the presence of an oral contract to convey."

The Utah Court went on and held in the Ravino case that the Plaintiff in that case did not acquire possession of the property owned by the Defendant. This is not the case before the Court. In Ravarino vs. Price the Utah Supreme Court states that the grantor of the "Terry Strip" had no interest in Defendant's property, and therefore, possession of the "Terry Strip" could not be possession of Defendant's property.

The facts of the Ravarino case are not the same as our case. There are basic principles discussed in the Ravarino case which are applicable in our case. In our case there is no question that the Plaintiffs went into possession of the property owned by the Defendant. This possession coupled with the making of substantial valuable improvements constitute sufficient part performance and would work a substantial hardship and injustice if the specific performance was not granted.

The Defendant cites Christensen vs. Christensen, Utah 339 P2d 104. The Plaintiff agrees with the principals stated in this case. The Plaintiff asserts that the contract was definite, clear and unambiguous. The sale price for the Defendant's interest in the property was \$28,500.00 to be paid in cash. That upon payment of the cash, the Defendant was to deliver a Deed to the property. The date of possession was established by the Plaintiff going into possession in December of 1977.

The Defendant argues that the possession of one co-tenant is for the benefit of all co-tenants. This might be true if possession was all that was involved. But we have substantial improvements coupled with possession based upon

an oral contract. It seems completely illogical for the Defendant to assert his position when substantial valuable improvements were made upon the property by the Plaintiffs when he made no objection or did nothing. These improvements would not have been made if there had not been an oral contract. No person in their right mind is going to enter upon the property of another and build a new home and other improvements upon the property at a cost of exceeding \$100,000.00 when they did not have reason to believe that there was an oral contract to convey the property.

Defendant argues that the improvements made upon the property by a co-tenant are for the benefit of the co-tenant not adverse to them. The evidence before the Court, show the home that was build by Mr. Ryan upon the property for his family. Is Mr. Earl claiming rights to 1/2 interest in the home? Certainly such reasoning is inconceivable. The nature of the improvements made upon the property by the Plaintiff are completely inconsistent with a tenant in common situation. The nature of the improvements made and the extent thereof was for the Plaintiff's own use and benefit and not for Mr. Earls benefit. Plaintiffs had ousted Mr. Earl from the property. Notice that Plaintiffs were claiming the property adverse to Defendant is shown by the

fact of the building of the new home on the property. The action of the Plaintiff's rights clearly show Plaintiffs were acting adverse to Defendant's rights.

In light of the foregoing it is clear that the evidence supports by clear and convincing evidence, the existence of a contract. The part performance by the Plaintiff herein, required the Court to enter its Order of Specific Performance under the rules announced in the Ravarino vs. Price case Supra.

In the case of Woolsey vs. Brown 539 P2d 1035, appears to be the last Utah decision in this general area, and the Court in that case, states:

" Equity will not permit a party to accept performance for many years and then claim terms contrary to the evidence as a basis to substantiate an assertion of indefiniteness and thus avoids specific performance."

CONCLUSION

From the foregoing it is clear that the evidence supports the findings of contract to sell and convey the property to the Plaintiffs. The plaintiffs have met their burden by clear and convincing evidence. The trial Court analyzed the evidence correctly. There is no attempted fabrication of a contract here. Plaintiff is entitled to a decree of Specific Performance and the judgment of the trial

Court should be affirmed.

Respectfully submitted this 14 day of April, 1980.

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